IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.484 OF 2007

IN
CASE NO.6/RA OF 2007

Smt.Barkha Gagan Dialani ...Applicant
Vs.
The Union of India & Anr. ...Respondents

Mr.Subhash Jha with Bharat Vaishnawa with Ghanshyam Upadhyay with A.B. Dubey and Laxmi Menon, Advocates, i/b. Bharat Vaishnav & Co. for the Applicant. Ms.R.M. Gadhvi, APP for the Union of India. Mr.U.V. Nikam, APP for the State.

CORAM : J.H. BHATIA, J.
Date : March 1, 2007.

P.C. :

. Heard Mr.Jha, learned counsel for the applicant and Ms.Gadhvi, learned APP on behalf of the Respondents.

2. The applicant is arrested on 15th January, 2007 by Customs Department under section 135 of the Customs Act. The allegations against the present applicant is that she had unlawfully and fradulantly claimed a drawback of Rs.1,23,73,286/- in respect of 44 shipping bills by showing excess value of the exported goods. She failed to bring in the foreign exchange remittance in respect of the exports, which are required to be brought within six months as per the directives from the Reserve Bank of India. The application filed by the present applicant came to be rejected by the Additional Chief Metropolitan Magistrate and by the Sessions Court and therefore the present applicant is

before this Court seeking bail.

. According to the applicant she is arrested on the allegation of exporting carpets and over valuing the same in the shipping bills. The offence falls under section 135(1)(ii) of the Customs Act and it is held to be a bailable offence and the applicant is entitled to be released on bail but the Courts below have committed error in not granting bail. The application is opposed on behalf of the Respondents on the ground that the offence falls under section 135(1)(i) of the Customs Act which is punishable with imprisonment of seven years and therefore not bailable. It is contended that the offence does not fall under section 135(1)(ii) but even if the offence falls under section 135(1)(ii), still it is not bailable.

3. As per the allegations made by the Respondents, carpets were exported and in the shipping bills value of the goods was shown more than the actual value and the foreign exchange remittance are not brought in as per the value in the bills. On the basis of over-value in the shipping bills, the present applicant had taken a drawback of huge amount of Rs.1,23,73,286/- from the Revenue and thus she has cheated the State Exchequer to that extent.

4. Section 135(1) provides that if any person is in relation to any goods in any way knowingly concerned

in misdeclaration of value or in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods, or he acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods, which he knows or has reason to believe are liable to confiscation under section 111 or section 113, as the case may be or attempts to export any goods which he knows or has reason to believe are liable to confiscation under section 113, he shall be punishable under section 135(1)(ii), in the case of an offence relating to any of the goods to which section 123 applies and the market price whereof exceeds one lac of rupees, with imprisonment for a term which may extend to seven years and with fine and in any other case with imprisonment for a term which may extend to three years or with fine or with both under section 135(1)(ii). Section 123 applies only to gold, diamonds, manufactures of gold or diamonds, watches and any other class of goods which the Central Government may by Notification in the Official Gazette specify. In the present case admittedly the carpets are not the goods which are so notified by the Central Government and therefore there is no doubt that section 123 is not applicable. Once it is held that section 123 is not applicable, the case must fall under section

135(1)(ii), which provides with imprisonment for a term which may extend to three years or with fine or with both.

5. In the case of Subhash Choudhary V/s.Deepak Jyala (2005) in Criminal (L) No.1034 decided by the learned Single Judge of this Court (Coram : A.M. Khanwilkar, J), it has been clearly held, after taking into consideration all the legal provisions, that the offence under section 135(1)(ii) is bailable offence. This authority has been followed by another Single Judge (Coram : S.C. Dharmadhikari, J) in the case of Kuresh Taherbhai Rajkotwala V/s. Union of India & Ors. in Criminal Application No.4264 of 2006 decided on 1st December, 2006 and again in Criminal Application No.4230 of 2006 Pramod K. Shah V/s. Commissioner of Custom. The same authority is followed by this Court in Criminal Application No.272 of 2007 in the case of Sangit Krishna Kumar Agrawal V/s. Union of India & Ors. decided on 6th February, 2007 by me. It is difficult to accept the contention of the Respondents that the offence under section 135(1)(ii) is not bailable.

6. In view of the provisions of section 436 of the Cr.P.C. a person, who is arrested in a bailable offence, is entitled to be released on bail. There was a question before this Court as to whether this Court could impose the condition to deposit the drawback

amount. However Mr.Jha points out that in view of the provisions of section 437(3) of the Cr.P.C. such condition can be imposed only if the offence is punishable with imprisonment which may extend to seven years or more or if the offence is under Chapter XVI or XVII of the Indian Penal Code. Chapter XVII deals with the offences against property and include the cases of cheating etc. If the respondents would have invoked any provisions of cheating etc. covered under Chapter XVII of the Indian Penal Code, it would not be difficult for this court to impose the condition to refund or deposit the amount which has been received by the applicant as drawback. However in spite of the opportunity given to the prosecution, the learned APP Ms.Gadhvi makes a statement that the prosecution has not invoked any provision under the Indian Penal Code and the only provision, which is invoked against the present applicant is under section 135 of the Customs Act. She contended that the investigation is going on and after investigation the customs officer would be in position to decide which section can be invoked. As the bail application is to be decided now, this Court has to find out whether the offence is bailable or not and whether under the law any condition can be imposed at the time of granting bail or not. Therefore this question cannot be left to future when a customs officer may take a decision about invoking any other provision of law. As of now the present applicant, is arrested only for the offence under section 135,

punishable under section 135(1)(ii), which is bailable. The offence being bailable, in view of the provisions of section 436 and 437 of Cr.P.C. no conditions can be imposed.

. Ms.Gadhvi, learned APP, however contends that if bail is granted to present applicant there is possibility that she may abscond and may not be available for trial. For this care can be taken while granting bail.

. The applicant is hereby granted bail in the sum of Rs.1 lac with solvent surety in like amount. As it will take some time to secure the solvency certificate, she shall be released on cash security of equivalent amount for a period of two weeks. However on or before expiry of that period, she will have to furnish solvency certificate. She will also surrender her passport, if any.

(J.H. BHATIA, J.)